In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-262

FAYETTA GILBOUGH GANNON, Individually and as Executrix and Trustee of the Estate of Clair H. Gannon, Deceased,
Petitioner,

VERSUS

MOBIL OIL COMPANY, a Division of Socony Oil Company, Inc., a Corporation,
Respondent.

RESPONSE OF RESPONDENT IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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August, 1978

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In the
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OPINION BELOW

The opinion of the Court of Appeals for the Tenth Circuit, dated March 30, 1978, is Appendix A; the order of the Court of Appeals for the Tenth Circuit denying rehearing, dated May 3, 1978, is Appendix B; Findings of Fact and Conclusions of Law on Directed Verdict entered by the United States District Court for the Eastern District of Oklahoma, dated September 15, 1976, is Appendix C; the index to the Record on Appeal is Appendix D.

JURISDICTION

Petitioner invokes jurisdiction under 28 U.S.C. § 1254 (1). For reasons stated under Argument, this is not a proper case for certiorari.

QUESTION PRESENTED

Respondent controverts the statement of the Questions Presented in the Petition on the ground that the matters alluded to therein are not and were not in issue in this case. Rather, the issue before the trial court and appeals court, and sought for review here was:

> **DID THE RESPONDENT MOBIL HAVE THE RIGHT AND DUTY UNDER OKLAHOMA LAW TO PLUG THE ABANDONED OIL AND GAS WELLS ON THE LEASED PREMISES, AND WAS THE PLUGGING BY MOBIL DONE IMPRUDENTLY AND MALICIOUSLY, SO THAT PETITIONER AND HER NEW LESSEE, NELSON GEYER D/B/A THERMO-DYNE, INC. WERE UNABLE TO RE-ENTER THE WELLS?**

STATEMENT OF THE CASE

This is an action for damages for alleged wrongful plugging of six wells on an oil and gas lease operated by Mobil in Murray County, Oklahoma. For convenience, the Petitioner is referred to as "Gannon" or "plaintiff" and the Respondent as "Mobil" or "defendant."

Gannon executed an oil and gas lease on October 14, 1959, covering the subject lands, granting Mobil the exclusive right to explore for and produce oil and gas, which

lease was for a primary term of ten years and so long thereafter as oil, or other hydrocarbons were produced therefrom (PL. Ex. 1, R. 491). The oil and gas lease remained in force and effect through production of hydrocarbons by Mobil and its partial assignee, Nelson I. Geyer d/b/a Thermo-Dyne, Inc., royalties on which were paid by Mobil and accepted by Gannon (PL. Ex. 5, R. 504).

On August 3, 1967, Mobil agreed to partially assign the oil and gas lease for primary operation of the wells located thereon as to the Second Bromide Sand (PL. Ex. 6, R. 505). Thereafter, on December 24, 1967, Mobil executed a partial assignment of the oil and gas lease for only three years, at which time the interest would revert to Mobil unless the parties entered into a further agreement. Also, Mobil reserved all interest above and below the Second Bromide Sand (PL. Ex. 9, R. 510). Mobil's partial assignee, Nelson I. Geyer, produced a total of 9,982.35 barrels of oil and condensate beginning in April, 1968, a majority of which were hydrocarbons bought by Geyer and injected in the wells (R. 177). All rights to Geyer expired on December 24, 1970 (PL. Ex. 9, R. 510, R. 109). Mr. Geyer spent $200,000.00 in trying to produce the lease during the three-year term of the limited assignment (R. 208). Mr. Geyer, as was Mobil, was unsuccessful in producing the lease to the point of economics (PL. Ex. 10, R. 512; R. 255). Mobil was unable to establish satisfactory production from the lease and Mobil's costs were from $17.00 to $32.00 per barrel, an amount far exceeding the market value, even today! (R. 255; PL. Ex. 3, 502; PL. Ex. 16, R. 518).

Gannon failed to introduce any evidence to sustain the allegation that Mobil had abandoned the subject oil and gas

lease prior to 1971. Further, the undisputed evidence introduced by Mobil without objection by Gannon showed that the defendant formed an intention to abandon the lease in July, 1971, at which time the plugging and abandonment operations were commenced, and thereafter prosecuted to completion on December 8, 1971 (PL. Ex. 18, R. 520; R. 259-263). Mobil was in the process of plugging and abandoning the leases on August 23, 1971 (PL. Ex. 10, R. 512). Thermo-Dyne, Inc. (Nelson I. Geyer) offered to Mobil to assume the responsibility of plugging and abandoning this lease (PL. Ex. 10, R. 512) but Mobil declined the offer because ". . . it would be difficult for Thermo-Dyne to indemnify Mobil against all liability as the result of sale of equipment and assumption of plugging and abandoning the wells." (PL. Ex. 11, R. 513). Mobil continued the process of plugging and abandoning and advised Thermo-Dyne, Inc. to "start moving that equipment that belongs to them." (PL. Ex. 13, R. 515; PL. Ex. 16, R. 518; PL. Ex. 18, R. 520).

On November 1, 1971, counsel for plaintiff inquired of Mobil regarding the status of the lease (PL. Ex. 15, R. 517) and Mobil replied on November 9, 1971, that it was in the process of plugging the wells and cleaning up the property (PL. Ex. 16, R. 518). On November 17, 1971, Fred Gannon, counsel for plaintiff, purported to call Mr. C. H. Bland, landman for Mobil, and asked him not to plug the wells, and Fred Gannon stated that Mr. Bland "was a very polite gentleman" and his (Bland's) remarks *to the effect* were "I'll tell my boys not to plug the wells" (R. 38). Mr. Bland's only recollection of this uncorroborated testimony of Fred Gannon was that Fred Gannon had some questions about plugging "which I (Bland) couldn't answer because I'm

not familiar with well plugging and so forth" (R. 86). Neither appellant nor her counsel Fred Gannon took any action at law or equity with respect to this lease in order to stop the plugging and clean-up operations until 23 months later when this action was filed (October 11, 1973).

Defendant Mobil was an owner and an operator of the oil and gas, and injection wells located on the oil and gas lease, and it retained those rights until termination of the lease (PL. Ex. 5, R. 504; PL. Ex. 6, R. 505; PL. Ex. 9, R. 510). Notice of Intention to Plug was timely filed with the Oklahoma Corporation Commission (R. 258, 259). Mobil made a decision and commenced operations to plug and abandon in July, 1971 (R. 258, 259, 283). Mobil plugged the wells in a manner to insure that the old wells would no longer leak oil, gas, salt water, etc. to the surface (R. 134, 135) using cement to seal off the oil and gas producing formations and to seal off the fresh water sands and prevent migration of fluids to the surface, all in keeping with Oklahoma plugging laws and in order to seal off the old producing interval that had been leaking oil to the surface for years (R. 269, 270; R. 286-289; R. 295). The wells were plugged in conformity with the requirements of the Oklahoma Corporation Commission (PL. Ex. 18, R. 520; R. 183; R. 270-272). Nelson Geyer stated that Mobil did "a damned good plugging operation"; and that Mobil acted as a reasonable and prudent operator in the plugging of the wells on the lease (R. 135; R. 183; R. 185-6). These efforts to make sure the wells were properly plugged shows good faith of Mobil and certainly no ill will to Gannon or the surface owner. The surface owner, Burke Healey, testified that the old lease was a problem for years with seepage to the sur-

face and "they (Mobil) are the only operator that operated it in a way that's compatible with nature and the environment, and it was well operated, and when they sealed it, it was restored" (R. 295).

Since 1919, six other oil and gas operators or lessees have attempted to produce oil and gas in commercial quantities economically from this property and none have succeeded (PL. Ex. 3, 502; R. 218).

Finally, plaintiff executed an oil and gas lease beginning January 7, 1972, to Thermo-Dyne, Inc. Thereafter, Thermo-Dyne, Inc., without any unusual difficulty, cleaned out one of the wells Mobil had plugged, drilled another well, and further tested the area. Geyer was able to produce some oil, but not economically or in commercial quantities (PL. Ex. 3, R. 502; PL. Ex. 16, R. 518; R. 206-8). Geyer's unrefuted testimony was that the wells could be re-entered and that it was his plan in December, 1975 to go back and try to fire-flood the reservoir (R. 139, 204, 205).

ARGUMENT

I.

THIS CASE HAS A NARROW SCOPE AND IT IS OF NO GENERAL INTEREST OR PUBLIC IMPORTANCE. NO CONFLICT AMONG THE COURT OF APPEALS IS INVOLVED HERE AND THE ONLY REAL DISPUTE IS THAT THE PETITIONER DOES NOT AGREE THAT THE RESPONDENT MOBIL PLUGGED THE WELLS IN QUESTION UNDER THE STATUTORY AND REGULATORY MANDATES OF THE STATE OF OKLAHOMA IN ORDER TO PROTECT THE PUBLIC INTEREST.

The subject matter of this case is a single tract of land covering 570 acres of land in Murray County, Oklahoma. The facts do not involve any other land anywhere else. Petitioner contends here, as it contended in both courts below, that the Respondent Mobil had no responsibility or liability to the public to plug and abandon wells which it operated on the 570-acre lease. She further contends that the plugging operations were excessive and should not have been instituted because the wells were capable of production at the time of abandonment of the lease. The courts below found that the nature of the viscous asphaltic-like oil underlying the lease necessitated the precautions instituted by Mobil in abandoning the operations and plugging the wells; and that the operations were to protect the surface of the lease and to also protect the hydrocarbons remaining in the ground. There is no conflict in the evidence that many operators over a period of nearly 50 years have attempted to produce the property without success. The courts below also found that Mobil was acting within

its statutory responsibility to plug the wells in the manner in which the wells were plugged. This was a very reasonable and proper construction and there is no conflict between the Courts of Appeal or other courts below with respect to these matters of law.

The extraordinary writ of certiorari may not be invoked in lieu of appeal. *Hartford Acc. & Indem. Co. to Use of Silva* v. *Interstate Equipment Corp.*, 176 F.2d 419 (3d Cir. 1949), *cert. den.* 338 U.S. 899, 94 L.Ed. 553; 28 U.S.C.A. Sec. 1651. Although, as stated in Rule 19(1) of the Supreme Court Rules, its issuance is not a matter of right, but of sound judicial discretion, ". . . [the writ] will be granted only where there are special and important reasons therefor." It is submitted that no such reasons here exist.

Petitioners seek review of a decision of a court of appeals, concerning which subsection (b) of Rule 19 lists the grounds for exercise of this Court's discretion in all but the most exceptional cases.

First, this Court will issue a writ where ". . . a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter;" No conflict among circuits exists here, nor could any exist. The rules of plugging and abandonment are strictly matters of law in Oklahoma and the obligations with respect to plugging and abandonment are matters of law arising in Oklahoma.

Second, a writ may issue where a court of appeals ". . . has decided an important state or territorial question in a way in conflict with applicable state or territorial law;"

Here, on the contrary, the decision of the Court of Appeals squarely affirms state law on the precise question at issue here. *Amax Petroleum Corp.* v. *Corp. Comm'n.*, 552 P.2d 387 (Okla. 1976) and *Loriaux* v. *Corporation Commission of the State of Oklahoma*, 514 P.2d 941 (Okla. 1973).

Third, a writ will issue where a court of appeals ". . . has decided an important question of federal law which has not been, but should be, settled by this court;" There is no question of federal law involved in the decisions of the courts below. Rather, these are matters of state law, involving the public interest in having proper plugging and abandonment of oil and gas wells so that the surface and sub-surface are fully protected from seepage. Petitioner asks that such rules and regulations and laws with respect to plugging and abandonment of wells in Oklahoma be ignored and that the public interest be set aside.

Fourth, a writ may issue where a court of appeals ". . . has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such departure by a lower court, as to call for an exercise of this court's power of supervision." No contention has been made by the Petitioner here of any such departure, or of any jurisdictional or procedural irregularity or even of any abuse of discretion by the court below. Petitioner has had her full and fair day in court, and now complains that the result is wrong.

Although the Petitioner asserts in her Petition that she is not asking this Court to weigh the evidence, it is obvious from a mere cursory reading that this is exactly what she is seeking!

Finally, it is said that a writ of certiorari should be exercised sparingly, and should only issue in cases of peculiar gravity and general importance. *Ex parte Lau Ow Bew*, 141 U.S. 583, 35 L.Ed. 868 (1891). For this reason, perhaps more than any other, Respondent submits that certiorari here is inappropriate where there is absolutely no general public importance with respect to this case. The facts are peculiar to this geological structure, which contains heavy viscous, asphaltic-like oil, and which remains in place to this day as property of the Petitioner. Petitioner and her predecessors in interest have profited from lease bonuses and rentals over many years of ownership, and the new leasing of the property by Petitioner after plugging of the wells by Mobil, demonstrates that Petitioner's argument has no merit.

II.

PETITIONER'S REASONS FOR GRANTING THE WRIT ARE INCORRECT AND ARE NOT SUPPORTED BY THE RECORD.

Petitioner has consistently complained that the wells on the lease were "destroyed" by the Respondent. This is a "boot-straps" argument which cannot be countenanced under any stretch of the imagination. Petitioner executed an oil and gas lease on January 7, 1972 to Nelson Geyer, the same operator who attempted to produce the oil and gas lease under the farmout from Respondent Mobil. Geyer drilled one well (R. 201) and re-opened one of the old wells (R. 128). Geyer re-entered the old well without experiencing exceptional difficulty (R. 200). He got down as far as he needed or wanted to go (R. 161, 162). In 1975, Geyer

had not given up on the Gannon lease (R. 205). He simply had other projects which took precedence over this lease (R. 205).

Under I., the Petitioner asks that the Court consider secondary recovery operations. Secondary recovery operations were conducted by Mobil Oil Corporation, without success. Petitioner introduced evidence with respect to secondary operations of Mobil and this was before the court below. The record shows that secondary or even tertiary operations *could* be conducted under Geyer's lease, but he has not chosen to do so.

Under II., Petitioner complains about a false statement of fact, seeking to weigh the evidence. The record is again clear that the decisions of the trial court and the appeals court are fully supported by the record. Since 1919, six operators attempted to produce oil and gas in commercial quantities and Mobil, the Respondent here, and Nelson Geyer, operating as Thermo-Dyne, Inc., also attempted to produce hydrocarbons in commercial quantities (R. 218). The uncontroverted evidence of the witness Carl Benkley with respect to the *insitu* or secondary recovery operations, was that the operating costs varied from $17.00 per barrel of crude to $32.00 per barrel, and the most ever received was $2.29 per barrel. This is ample evidence that the wells could not be produced economically at the time of abandonment, and Mobil was entitled to rely upon its own experts with respect to the degree of plugging necessary for protection of the surface and the sub-surface. *Sinclair Oil & Gas Company* v. *Bishop*, 441 P.2d 436 (Okla. 1968).

Under III., Petitioner gives as a reason for the issuance of the writ, that the court simply ignored Gannon's evi-

dence. Petitioner's citations of the cases are not dispositive of the issues before this Court, for the reason that Gannon relies upon one erroneous premise throughout the entire lawsuit—the "destroying of wells." The proof in the case is that the wells were not only not destroyed, but several of the wells were capable of use after the plugging and abandonment, and were used by subsequent operator Nelson Geyer. Also, the value of the holes could in no way outweigh the lawful burden imposed upon the Respondent operator under the guidelines set out in *Amax Petroleum Corp.*, supra, to plug these wells in such a manner as to prevent the re-occurrence of seepage to the surface which had, over the 30-year period previous to this, seeped to the surface and literally destroyed the surface of the land. The public interest is served only by the protection of our environment, which includes the surface as well as the hydrocarbons. In this instance, the hydrocarbons were not destroyed, but fully protected by the plugging methods utilized by Respondent. The right and duty to plug exists by force of law, both statutory and by Rule 3-401 of the Rules of the Oklahoma Corporation Commission. Title 17, Okla. Stat. 1971 § 53. The responsibility for plugging oil and gas wells has been a part of the common law in Oklahoma for too many years to enumerate, on the basis of the need to confine the hydrocarbons and deleterious substances which are subject to subsurface pressures to their original underground strata. The obligations to plug and abandon oil and gas wells have been summarized in many papers, but one example is that of Frank Douglass in *The Obligations of Lessees and Others to Plug and Abandon Oil and Gas Wells*, 25th Annual Institute on Oil and Gas Law and Taxation, 123, *et seq.*

CONCLUSION

This is an instance of an oil and gas operator meeting its statutory and common-law duty to properly plug oil and gas wells to confine the oil and gas to their original strata, so as not to harm the surface and so as not to harm any hydrocarbons remaining in place. Petitioner complains that this is an important energy case, and its only importance is that heavy asphaltic crude has been confined to the original geologic structure awaiting such technical advances as will permit it to be produced without harm to the environment. It is respectfully submitted that this is not a case proper for certiorari in any way and Petitioner has not only had her day in court, but weeks, months and years.

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August, 1978

APPENDICES

APPENDIX A

FILED
United States Court of Appeals
Tenth Circuit
MAR 30 1978
HOWARD K. PHILLIPS
Clerk

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 76-1945

FAYETTA GILBOUGH GANNON, individually, and as Executrix and Trustee of the Estate of CLAIR H. GANNON, Deceased, Plaintiff-Appellant, vs. MOBIL OIL COMPANY, a Division of SOCONY OIL COMPANY, INC., a corporation, Defendant-Appellee.	Appeal from the United States District Court for the Eastern District of Oklahoma (D.C. No. 73-272)

Submitted: January 26, 1978

Andrew Wilcoxen, Muskogee, Oklahoma, (Fred G. Gannon, Dallas, Texas, on the brief), for Appellant.

Max H. Lawrence of Walker, Lawrence and Walker, Oklahoma City, Oklahoma, and Sid M. Groom, Jr., Edmond, Oklahoma, (David R. Latchford, Mobil Oil Corporation, Denver, Colorado, on the brief), for Appellee.

Before SETH, Chief Judge, BARRETT and McKAY, Circuit Judges.

BARRETT, Circuit Judge.

Appellant, plaintiff below, Fayetta Gilbough Gannon, individually and as Executrix and Trustee of the Estate of Clair H. Gannon, Deceased (Gannon), appeals from a Directed Verdict awarded appellee, defendant below, Mobil Oil Company, a Division of Socony Oil Company, Inc., a Corporation (Mobil). Jurisdiction is based on diversity.

Gannon sued Mobil for both compensatory and exemplary damages predicated upon Mobil's alleged torts of trespass and intentional interference with Gannon's contractual rights under an oil and gas lease granted January 7, 1972, arising by reason of the plugging of certain abandoned oil wells on the Gannon property by Mobil. The trial court entered a detailed memorandum of findings and conclusions concurrent with the judgment granting the directed verdict.

On October 14, 1959, Gannon executed an oil and gas lease to Mobil covering 570 acres situate in Murray County, Oklahoma, for a primary term of ten years or so long as oil, gas or other hydrocarbons were produced therefrom. There were six non-producing oil wells located on the lands at that time, completed in the Second Bromide Sand. Mobil or its assignee-agent re-entered five of the six wells and, in addition, drilled and completed one more well to the Bromide Sand. Mobil also undertook an extensive "fireflood" operation in an effort to obtain commercial production of the low gravity oil in the reservoir, but terminated the uneconomic operation in October, 1966. On August 3, 1967, Mobil "farmed out" the wells by partial assignment of its leasehold rights for a term of three (3) years to Nelson I. Geyer (Geyer), d/b/a Thermo-Dyne, Inc. Geyer undertook an injection of oil condensate commencing in April of 1968 in an effort to revive production from the

lease at a total cost of about $200,000.00. His efforts, just as those of Mobil, were unsuccessful in terms of realizing commercial production. Geyer produced a total of 9,982.35 barrels of oil and condensate, most of which, however, had been injected in the wells. Geyer's right under the partial assignment expired December 24, 1970, at which time he terminated all efforts to obtain commercial or "economic" production. Thus, the basic lease also terminated, at the latest possible date, on December 24, 1970.

Mobil determined to abandon the Gannon lease and to plug the wells. Thereafter, it commenced plugging and abandonment operations in July, 1971. Geyer by letter of August, 1971, offered to relieve Mobil of any obligations relating to the plugging of the wells. Geyer informed Mobil of his desire to assume the responsibility of plugging the wells and purchasing Mobil's equipment at a "nominal" fee and then pursuing attempts to obtain a new oil and gas lease from Gannon. Mobil, however, declined the Geyer offer both because Mobil had been advised that it could not make any assurances as to whether its lease from Gannon was then valid and because ". . . *it would be difficult for Thermo-Dyne [Geyer] to indemnify Mobil against all liability as the result of sale of equipment and assumption of plugging and abandoning the wells.*" [Pl. Exh. #11, R., Vol. III, p. 513.] Mobil continued with the plugging process and notified Geyer to remove the equipment from the wells which belonged to him.

On November 1, 1971, Gannon wrote to Mobil inquiring about Mobil's intentions relative to the property. Mobil informed Gannon that it was then in the process of plugging [and abandoning] the wells. Gannon's attorney then spoke by telephone with a Mobil representative, advising that Gannon was then negotiating with Geyer for a new oil and gas lease on the property *and that Gannon was the owner of the wells rather than Mobil. He demanded that Mobil not plug the wells.* [R., Vol. I, pp. 36-38.]

Mobil's landman, one C. H. Bland, did receive a telephone call from Gannon's attorney relative to the plugging operation. Bland did not recollect the specifics of the conversation except that it did deal with the plugging operation. Bland testified that he informed Gannon's attorney that he was not familiar with well plugging matters. Gannon's attorney, however, testified that Bland [whom he seems to equate as Mobil] stated that the wells would not be plugged. In any event, the record reflects that even though Mobil proceeded with the plugging operations by pouring hundreds of sacks of cement into the oil producing formation, cementing steel tubing and iron into each well and filling each well from top to bottom with cement that neither Gannon, her attorney or any person on her behalf undertook action, steps or threats to prevent Mobil from proceeding with the plugging operations until the instant lawsuit was filed on October 11, 1973.

Mobil filed its Notice of Intention to Plug the subject wells with the Oklahoma Corporation Commission prior to commencement of the plugging operations in July, 1971. The record reflects that Geyer's efforts under the three year partial assignment of December 29, 1967, realized only limited production from the wells for April, 1968, through February, 1969. Some production was last sold from the lease by Geyer in September, 1971. Mobil had, of course, assigned only the right to production from the Second Bromide Sand to Geyer for the three (3) year term, reserving all other leasehold rights, together with all of the attendant duties, obligations and responsibilities imposed by virtue of such ownership.

Mobil completed the plugging operations on December 8, 1971. Geyer, who had obtained a new oil and gas lease from Gannon on the property for a three-year term commencing January 7, 1972, attempted to re-enter one of the wells plugged by Mobil but was unable to drill out the steel and iron which had been cemented into the hole.

Geyer also completed a new well in the Second Bromide Sand in August, 1974, and thereafter re-entered one of the wells plugged by Mobil, but gave up that effort. Geyer testified that in his opinion it would cost between $40,000.00 and $50,000.00 to re-enter the plugged wells because of the tail pipe and iron in the holes but that a prudent operator would prefer to spend $100,000.00 per well in drilling new wells rather than attempting to overcome the hazards of re-entry of the abandoned wells. [R., Vol. I, pp. 137, 141-144.]

Gannon acknowledges that it was not economically feasible for Mobil to produce the low gravity oil in 1966. However she contends that when Mobil commenced the plugging operation in 1971 the oil from the wells could have been produced in paying quantities because of the rapid increase in the price of crude oil. The trial court excluded evidence of the economics prevailing at the time of trial in June of 1976.

On appeal, Gannon contends that the trial court erred in granting the directed verdict by finding that: (1), (2) and (3), Gannon could not amend her complaint and the pre-trial order; Gannon had to plead and prove affirmative defenses to justify torts; Mobil's lease did not terminate until December 8, 1971, (4) Mobil was the "owner" and "operator" of the subject wells at the time it plugged same as such terms are defined by the rules and regulations of the Oklahoma Corporation Commission, (5) the wells were not prospect holes and the law applicable to the destruction of same did not apply, (6) the wells could not be produced in paying quantities at the time of the plugging operations, and thus erred in excluding evidence of the economics of producing the wells subsequent thereto and up to the time of trial, (7) the assignment of the wells and lease insofar as it covered the oil sand in which the wells were completed did not relieve Mobil of whatever duty, if any, it may ever have had to plug the wells, (8) Mobil had a

duty to plug the wells in view of the facts prevailing at the time of plugging and Rule 3-401(c), (9) certain facts controlled, (10) certain conclusions of law applied, (11) evidence pertinent to exemplary damages be excluded, and (12) Gannon's motion for directed verdict should be denied.

Geyer's testimony was most pertinent to the trial court's decision. He stated that in October or November of 1971 the type of sour crude being produced from the Gannon lease would sell for about $2.50 per barrel, after blending; that in order to render it marketable it would have cost much more than the sale price; and that his company lost about $400,000.00 in the process of the two operations conducted on the Gannon property. Even so, Geyer said that he was ". . . ready to lose a couple of hundred [thousand] more." [R., Vol. I Supp., p. 134-136.] As to the question of the validity of Mobil's lease after Geyer's unsuccessful efforts, Geyer acknowledged that on August 23, 1971, his efforts had been unsuccessful in producing from the Gannon lease "to the point of economics." He further stated that while he would like to continue "with a research program" on the property, his attorneys advised that there was a question about the validity of the Mobil lease in that although Geyer had produced a "limited amount" of oil during 1970 and 1971, still this was "perhaps not enough to hold the lease by production." [R., Pl. Ex. #10, Vol. III, p. 512.]

Following trial and oral arguments, the trial court considered the respective motions for directed verdict. The court found that as a result of the partial assignment from Mobil to Geyer and the attendant contractual arrangement between them, that the work ". . . performed by the farmout agreement of Geyer was in truth and in fact the work and services trying to produce oil for . . . Mobil . . . they were associates and partners to the degree set out in their agreement." [R., Vol. I, pp. 315, 316.] Thus, the court recognized Mobil's continuing obligation to plug abandoned wells

on the Gannon leasehold property. Reaching over to the "significant" period of September 3, 1971, the court observed that while Geyer had contacted Mobil regarding his desire to continue operations on the Gannon lease, Mobil rejected this request both because Mobil could make no assurances that its lease was still valid and because Mobil did not believe that Thermo-Dyne [Geyer] was financially capable of indemnifying Mobil against all liability with respect to the obligation of plugging and abandoning the wells and purchasing Mobil's equipment. [R., Vol. 1, p. 317.] When it became clear, as the trial court found it to be as a matter of law, that Mobil was obligated to plug and abandon the wells (and when Mobil had in fact commenced those operations) Gannon did nothing to stop those operations in order ". . . to save himself from damages he now claims [to have] suffered." [R., Vol. I, pp. 317-319.]

In regard to Mobil's lease termination, the trial court pointedly referred to a letter directed to Mobil by Gannon's attorney after Gannon was informed of Mobil's intention to plug and abandon the subject wells wherein it was stated that, "It is our understanding that this property has been dormant. However, during the months of August, 1971, and September, 1971, small royalties were paid and apparently sold from the lease." [R., Vol I, pp. 318, 319.] The trial court concluded therefrom that the receipt and retention of the royalty payments aforesaid were recognition by Gannon that such proceeds were then paid from operation of the lease and thus that the lease was then viable in the name of Mobil. [R., Vol. I, pp. 318, 319.]

In its formal findings of fact and conclusions of law, the trial court reviewed the factual background together with the statutory and regulatory laws of Oklahoma relating to the right and duty to plug abandoned oil wells. The court specially found that Mobil was the owner and operator of the wells on the lease at the end of the Geyer

farm-out and that Mobil had the duty, liability and responsibility to plug the wells and that the partial assignment to Geyer did not relieve Mobil of this responsibility. [R., Vol. II, pp. 480, 481.] The court concluded, having considered the evidence in the light most favorable to Gannon, that ". . . the evidence supported but one conclusion with which reasonable men could not disagree." [R., Vol. II, pp. 484, 485.] We agree.

I.

The critical, dispositive issue, found as controlling by the trial court, is: that Mobil was, at all times involved, the owner and operator of the wells on the Gannon lease and that at the end of the Geyer farm-out operations Mobil had the duty, liability and responsibility to plug the wells which had then been abandoned. We agree with the trial court's analysis of the facts and the applicable law.

Oklahoma law provides that upon abandonment of an oil well the owner or operator is obligated, responsible and liable for plugging the well in accordance with the applicable rules of the Corporation Commission. 17 Okla. Stat. Ann. 1971 §53; 52 Okla. Stat. Ann. 1971, §§862, 273, 309 and 310; OCC-OGR §3-401(a); Loriaux v. Corporation Commission, 514 P.2d 941 (Okla. 1973); United States v. 79.95 Acres of Land, etc., Rogers Co., Okl., 459 F.2d 185 (10th Cir. 1972); Bryan v. State, 133 Okl. 213, 271 P. 1020 (1928).

The Oklahoma Corporation Commission was created by Art. IX of the Oklahoma Constitution in 1907. Under present day statutes, the Commission has broad power to prescribe rules and regulations governing the plugging of all abandoned oil and gas wells. Such rules and regulations provide, *inter-alia*, that: Each well in which production casing has been run, but which has not been operated for six months and each well in which no production casing has been run, but for which drilling operations have ceased for thirty consecutive days shall be immediately plugged,

OCC-OGR §3-401(b); each well must be plugged in a manner recognized as good and accepted practices and standards in the industry, OCC-OGR §3-404(b); any person who drills or operates any well for exploration, development, or production of oil or gas is required to furnish, on forms approved by the Commission, an agreement in writing to drill, operate, and plug wells in compliance with the rules and regulations and to submit a semi-annual financial statement showing that his net worth (in Oklahoma) is not less than $10,000.00; *the owner and operator of any oil or gas well, whether cased or uncased, is jointly and severally liable and responsible for the plugging thereof in accordance with the rules and regulations as to abandonment and plugging prescribed by the Oil and Gas Conservation Division*, OCC-OGR §3-401(a). The authority of the Oklahoma Corporation Commission, under the governing statutes, has been consistently recognized in the rule making area to be that of promulgating rules requiring adequate and proper plugging and abandonment of an oil and gas well under the state's police power in order to prevent waste and pollution and to provide for the safety of the public generally. Wakefield v. State, 306 P.2d 305 (Okla. 1957); Sheridan Oil Company v. Wall, 187 Okla. 398, 103 P.2d 507 (1940); Magnolia Petroleum v. Witcher, 141 Okla. 139, 284 P. 297 (1930). Thus, the duty and liability to plug arises when an oil and gas well is abandoned or taken out of production. The essence of the concept of abandonment is aimed principally at preventing fugacious materials in the various strata pierced by the well from entering the bore so as to permit its movement into other strata or onto the surface. Significantly, Oklahoma has recognized a common-law duty to plug. Sheridan Oil Company v. Wall, *supra*.

We view it as significant that OCC-OGR §3-407 is the only regulation relating directly to the landowner's utilization of an abandoned oil or gas well. It provides that if such a well may safely be used to provide fresh water and such utilization is desired by the landowners, the cement plug,

extending 50 feet into the surface casing, shall be set, except that the top thirty foot plug need not be set, provided that written authority for such use is secured from the landowner and filed with the Commission's plugging record. This relieves the operator *only* of the responsibility above the thirty foot plug. OCC-OGR §3-407.

Sheridan Oil Co. v. Wall, *supra*, holds that a lessee who abandons an oil well without proper plugging stands in the position of a tenant who surrenders the premises without making the necessary repairs. The court there awarded the landowner recovery against the lessee for the costs of re-plugging the abandoned oil well in order to prevent pollution.

Loriaux v. Corporation Commission, *supra*, holds that the owner and operator of oil and gas leases upon which wells had been drilled is obligated to plug abandoned wells, despite an assignment of the leases, where the wells were found to have been abandoned prior thereto. And, in an action to recover damages resulting from an allegedly improperly plugged well, it has been held that the causal connection can be established from circumstantial evidence and that the question of negligence and proximate cause of the injury or damage is one for jury determination. Sunray Mid-Continent Oil Co. v. Tisdale, 366 P.2d 614 (Okla. 1961). *See also*: Salmon Corporation v. Forest Oil Corporation, 536 P.2d 909 (Okla. 1974).

Thus, just as the trial court found, the Oklahoma authorities above cited, when considered in the light of the facts reflected in the record before us, fully support these conclusions: that all operators are responsible for proper plugging of abandoned oil and gas wells for the protection of the surface and sub-surface strata; that cessation of production with no intent to continue operations evidences abandonment; that Mobil was the owner and operator of the wells on the Gannon lease when Geyer's rights expired under his partial assignment contract and that Mobil was,

as such owner and operator, obligated by law to plug the wells.

A decision of particular relevance, we believe, is that of Amax Petroleum Corporation v. Corporation Commission, 552 P.2d 387 (Okla. 1976), involving an action brought against Amax to require it to plug certain gas wells. By various assignments, Amax became the owner of an oil and gas lease upon which several gas wells had been previously drilled, developed and operated. In 1957 or 1958, Amax determined to abandon these wells and the field of which they were a part. No production had been realized from the wells after 1957. On July 28, 1959, about two years after the gas wells were shut in, Amax assigned the oil and gas lease upon which the wells were drilled back to the landowners, an elderly couple, neither of whom had been engaged in the oil and gas industry (or had at any time operated oil or gas wells). The landowners died within one year following re-assignment. Their daughter became the owner of the property. The Commission ordered that Amax plug the wells. Amax refused, contending that the Commission order was invalid because, (a) the Commission had no authority to require the plugging of any oil or gas well which has not been abandoned or permanently abandoned and (b) that there was no evidence that the wells had been abandoned or permanently abandoned *prior* to the date Amax assigned the lease back to the original landowners-lessors. The Court held that the re-assignment from Amax to the landowners did not have the legal effect contended by Amax. In 1973 the Commission's field inspector found some of the wells had not been properly plugged since their abandonment in 1959. In pertinent part, the Court held that the re-assignment of the lease from Amax to the original landowners did not relieve Amax of its duty to plug the wells:

> While the statute could be more specific, the things about which it could be more specific are certainly

implicit in the statute. *Thus, the person to plug the well is the lease operator, not a stranger to the operation; and the time to plug is when the well is abandoned and certainly not before.* We would assume that a definition of abandonment would add little to resolving specific fact situations where, as here, a question is raised as to whether abandonment has occurred or not.

552 P.2d, at 391, 392.

In the case at bar there can be no dispute that Mobil clearly announced its intention to relinquish the wells and the lease premises. Thus, Mobil's intention was affirmatively declared. Such acts constitute a relinquishment of the premises. *See*: Dow v. Worley, 126 Okla. 175, 256 P. 56 (1926); Carter Oil Co. v. Mitchell, 100 F.2d 945 (10th Cir. 1939); 1 Am. Jur. 2d §§1, 39 and 40. Under Oklahoma decisions, the "abandonment" of an oil and gas lease comes about with a concurrence of an intention to abandon and the act of physical relinquishment. Magnolia Petroleum Co. v. St. Louis-San Francisco Ry. Co., 194 Okla. 435, 152 P.2d 367 (1944).

While cessation of operations under an oil and gas lease is not alone sufficient to establish abandonment [Fisher v. Dixon, 188 Okla. 7, 105 P.2d 776 (1940)], it has been held that an unreasonable delay by the lessee in undertaking further exploration coupled with the lessee's declaration that further drilling would be unprofitable is sufficient evidence to establish abandonment. Fox Petroleum Co. v. Booker, 123 Okla. 276, 253 P. 33 (1926). *See also*: Doss Oil Royalty Company v. Texas Co., 192 Okla. 359, 137 P.2d 934 (1943); Dow v. Worley, *supra*. Both elements were clearly established on the part of Mobil in the instant case.

II.

We have carefully considered the additional allegations of trial court error urged by Gannon. We hold that they are individually and collectively without merit. For the most part they have been effectively disposed of adversely to Gannon in our discussion of the facts, contentions and legal principles.

At the time that Mobil determined to abandon the wells there was no evidence that further operations would prove economically feasible. It matters not that a change in the market value of the crude oil at some future time (here, as alleged, at the time of trial) *may have then* dictated additional operations rather than abandonment. Gannon's own expert, Geyer, acknowledged that the wells and the operations had proven uneconomic at the time Mobil declared its intention to plug the wells and abandon the property. Furthermore, Geyer testified that the method and technique employed by Mobil in plugging was well done. There were others, of course, who testified otherwise. No reference is made that the Oklahoma Corporation Commission has at any time or in anywise challenged Mobil's method of plugging the wells on the Gannon property. We are puzzled by Gannon's allegation that Mobil was a "trespasser" when it entered upon the premises to plug the wells because the lease had terminated. Gannon contends that Mobil had no right to enter upon the premises after the oil and gas lease terminated and then to "destroy . . . wells to which it had no right." [Brief of Appellant, p. 50.] Even though the trial court found—with substantial support in the record—that Mobil's lease had not terminated when it commenced plugging operations, we believe that if Gannon's contention were to prevail it could very likely render Oklahoma's statutory and regulatory mandates requiring plugging of abandoned wells in order to protect the public interest ambiguous to the extent that an operator such as Mobil might contend, following simple termination of the

lease, that it has been relieved of the statutory, regulatory and common law obligation and responsibility to plug the wells. Such a result is not countenanced under Oklahoma law. It would not serve the public interest.

WE AFFIRM.

APPENDIX B

MARCH TERM—May 3, 1978

Before Honorable Oliver Seth, Honorable James E. Barrett, and Honorable Monroe G. McKay, Circuit Judges

FAYETTA GILBOUGH GANNON, individually and as Executrix and Trustee of the Estate of Clair H. Gannon, Deceased,	)	
Plaintiff-Appellant,	)	
vs.	)	No. 76-1945
MOBIL OIL COMPANY, a Division of SOCONY OIL COMPANY, INC., a corporation,	)	
Defendant-Appellee.	)	

This matter comes on for consideration of the motions and responses relating to appellant's petition for rehearing and for clarification in the captioned cause, including the suggestion for rehearing en banc.

Upon consideration whereof, it is ordered:

1. The appellant's petition for rehearing is permitted to be filed as of April 14, 1978. The petition for rehearing en banc and for clarification is permitted to be filed as of April 21, 1978.

2. The petition for rehearing is denied by the panel of Circuit Judges Seth, Barrett and McKay to whom the cause was argued and submitted.

No judge in regular active service or a judge who was a member of the panel that rendered the decision sought to be reheard having requested a vote of such suggestion

for rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion is denied.

s/ Howard K. Phillips
HOWARD K. PHILLIPS, Clerk

A true copy

Teste
Howard K. Phillips
Clerk, U. S. Court of
Appeals, Tenth Circuit

By
s/ Stephanie Schetrom
Deputy Clerk

APPENDIX C

FILED
SEP 15 1976
LEWIS L. VAUGHN
Clerk, U. S. District Court
By.....
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF OKLAHOMA

FAYETTA GILBOUGH GANNON, individually, and as Executrix and Trustee of the Estate of CLAIR H. GANNON, Deceased,	)	
Plaintiff,	)	
vs.	)	No. CIV-73-272
MOBIL OIL COMPANY, a Division of SOCONY OIL COMPANY, INC., a Corporation,	)	
Defendant.	)	

FINDINGS OF FACT AND CONCLUSIONS OF LAW ON DIRECTED VERDICT

This cause came on for trial on June 14, 1976, before the Court and jury, both parties being present by their attorneys. The issues have been duly tried and both plaintiff and defendant have concluded their case through the presentation of evidence. At the close of the evidence for the plaintiff, the defendant moved for a directed verdict for the reason that the evidence of plaintiff was insufficient to support a cause of action against this defendant. The Court took the motion under advisement and the defendant made its presentation of evidence, and thereupon renewed its motion for a directed verdict. The plaintiff also moved for a directed verdict as to liability.

Having fully considered the arguments of counsel and after a review of all the evidence in the case, the Court concludes that the motion of plaintiff should be denied, and that motion of defendant for a directed verdict should be sustained.

The Court finds that the following are undisputed facts covered by the stipulation between the parties filed in this cause and the evidence:

FINDINGS OF FACT

1. Plaintiff executed an oil and gas lease on October 14, 1959, to defendant covering the subject lands granting it the exclusive right to explore for and produce oil and gas, which lease was for a primary term of ten years and so long thereafter as oil, liquid hydrocarbons, gas or their respective constituent products were produced therefrom, (Plf's Exhibit 1).

2. The oil and gas lease remained in force and effect through production of hydrocarbons by defendant and its partial assignee, Nelson I. Geyer d/b/a Thermo-Dyne, Inc. (expert in low gravity oil production), royalties on which were paid by defendant and accepted by plaintiff, (Plf's Exhibit 5).

3. On August 3, 1967, defendant agreed to partially assign the oil and gas lease for primary operation of the wells located thereon as to the Second Bromide Sand, (Plf's Exhibit 6). Thereafter, on December 24, 1967, defendant executed a partial assignment of the oil and gas lease for only three years, at which time the interest would revert to Mobil unless the parties entered into a further agreement, and defendant reserved all interest above and below the Second Bromide Sand, (Plf's Exhibit 9).

4. Defendant's partial assignee, Nelson I. Geyer, produced a total of 9,982.35 barrels of oil and condensate beginning in April, 1968, a majority of which was hydrocarbons bought by Geyer and injected in the wells, (Plf's Exhibit 7; Geyer Deposition p. 20, 100). All rights to Geyer expired on December 24, 1970, (Plf's Exhibit 9; Geyer Deposition p. 34). Mr. Geyer spent $200,000 in trying to produce the lease during the three-year term of the limited assignment, (Geyer Deposition p. 136). Mr. Geyer was unsuccessful in producing the lease to the point of economics, (Plf's Exhibit 10). The defendant, Mobil Oil Company, was unable to establish satisfactory production from the lease, (Plf's Exhibits 3 & 16).

5. Plaintiff failed to introduce any evidence to sustain the allegation that the defendant had abandoned the subject oil and gas lease. Further, the undisputed evidence introduced by defendant without objection by the plaintiff showed that the defendant did not to any degree form an intention to abandon the lease until July, 1971, at which time the plugging and abandonment operations were commenced, and thereafter prosecuted to completion on December 8, 1971, (Plf's Exhibit 18; Testimony of C. R. Benkley and C. M. Rhodes).

6. The defendant Mobil Oil Company was in the process of plugging and abandoning the leases on August 23, 1971 (Plf's Exhibit 10). Thermo-Dyne, Inc. (Nelson I. Geyer) offered to Mobil to assume the responsibility of plugging and abandoning this lease, (Plf's Exhibit 10) but Mobil declined the offer because ". . . it would be difficult for Thermo-Dyne to indemnify Mobil against all liability as the result of sale of equipment and assumption of plugging and abandoning the wells." (Plf's Exhibit 11). Mobil continued the process of plugging and abandoning and advised Thermo-Dyne, Inc. to "start moving that equipment that belongs to them." (Plf's Exhibits 13, 16 & 18).

7. On November 1, 1971, counsel for plaintiff inquired of Mobil regarding the status of the lease (Plf's Exhibit 15) and Mobil replied on November 9, 1971, that it was in the process of plugging the wells and cleaning up the property, (Plf's Exhibit 16).

8. Neither plaintiff nor her counsel took any action at law or equity with respect to this lease in order to stop the plugging and clean-up operations until this action was filed on October 11, 1973.

9. The defendant Mobil Oil Company was an owner and an operator of the oil and gas, and injection wells located on the oil and gas lease, and it retained those rights until termination of the lease, (Plf's Exhibits 5, 6 and 9).

10. Notice of Intention to Plug was timely filed with the Oklahoma Corporation Commission, (Testimony of C. R. Benkley and Arnold Park). Mobil began plans to plug and abandon in July, 1971, (Testimony of C. R. Benkley). Mobil plugged the wells in a manner to insure that the old wells would no longer leak oil, gas, salt water, etc. to the surface (Geyer Deposition p. 54) using cement to seal off the oil and gas producing formations and to seal off the fresh water sands and prevent migration of fluids to the surface, all in keeping with Oklahoma plugging laws, (Plf's Exhibit 18; Geyer Deposition pp. 56, 57, 109, 110 & 111). The wells were plugged in conformity with the requirements of the Oklahoma Corporation Commission, (Plf's Exhibit 18; Geyer Deposition p. 107; Testimony of Arnold Park). Nelson Geyer stated that Mobil acted as a reasonable and prudent operator in the plugging of the wells on the lease, (Geyer Deposition pp. 110, 111) which was at a cost of $51,000 to Mobil for the plugging and clean-up operations, (Testimony of C. R. Benkley). This expenditure to make sure the wells were properly plugged shows good faith of defendant and certainly no ill will to plaintiff or landowner.

11. Since 1919, six other oil and gas operators or lessees have attempted to produce oil and gas in commercial quantities economically from this property and none have succeeded, (Plf's Exhibit 3; Testimony of David Dooley and Dale Bartlebaugh).

12. Finally, plaintiff executed an oil and gas lease beginning January 7, 1972, to Thermo-Dyne, Inc. Thereafter, Thermo-Dyne, Inc., without any unusual difficulty, cleaned out one of the wells Mobil had plugged and further tested the area, and neither Mobil nor Geyer was able to produce oil or gas in commercial quantities economically (Plf's Exhibits 3 & 16; Geyer Deposition pp. 133-136). There is no proof that all of the other wells plugged by Mobil could not have been re-entered.

CONCLUSIONS OF LAW

1. *The right and duty to plug exists by force of law, both statutory and by Rule 3-401 of the Rules of the Oklahoma Corporation Commission.* Title 17, Okla. Stat. 1971 §53 states:

> "The Corporation Commission is hereby authorized to prescribe rules and regulations for the plugging of all abandoned oil and gas wells. The same shall be plugged under the direction and supervision of the conservation agents of the Corporation Commission as may be prescribed by the Corporation Commission. . . ."

and, Title 52 Okla. Stat. 1971 §86.2 states:

> "The term 'waste', as applied to the production of oil, in addition to its ordinary meaning, shall include economic waste, under-ground waste, including water encroachment in the oil or gas producing purposes by means or methods that unreasonably interfere with obtaining from the common source of supply the largest ultimate recovery of oil; surface waste and waste incident to the production of oil in excess of transportation or marketing facilities or reasonable market demands. The production of oil in the State of Oklahoma in such manner and under such conditions as to constitute waste as in this Act defined is hereby prohibited, and the Commission shall have authority, and is

charged with the duty, to make rules, regulations, and orders for the prevention of such waste, and for the protection of all fresh water strata and oil or gas bearing strata encountered in any well drilled for oil or gas."

as well as Title 52 Okla. Stat. 1971 § 273, which establishes that:

"The term 'waste' as used herein, in addition to its ordinary meaning, shall include economic waste, underground waste, surface waste, and waste incident to the production of crude oil or petroleum in excess of transportation or marketing facilities or reasonable market demands. The Corporation Commission shall have authority to make rules and regulations for the prevention of such wastes, and for the protection of all fresh water strata, and oil and gas bearing strata, encountered in any well drilled for oil."

Pursuant to statutory grants, Oklahoma Corporation Commission Rules in force during 1971 declare:

"1-100. CITATION — EFFECTIVE DATE

(a) These Rules shall be cited as O.C.C. — O.G.R.

(b) The effective date of these Rules shall be January 1, 1971.

1-101. DEFINITIONS.

These definitions are provided for the sole purpose of proper interpretation of Corporation Commission rules and regulations:

. . .

7. Common Source of Supply or Pool — The term 'common source of supply' shall comprise and include that area which is underlaid, or which from geological or other scientific data, or from drilling operation, or other evidence appears to be underlaid, by a common

accumulation of oil and/or gas; provided that, if any such area is underlaid, or appears from geological or other scientific data or from drilling operations or other evidence, to be underlaid by more than one common accumulation of oil or gas separated from each other by strata or earth and not connected with each other, then such area shall as to each said common accumulation of oil or gas be deemed a separate common source of supply (52 O.S.A., § 86.1(c).

. . .

14. Deleterious Substances shall mean any chemical, salt water, oil field brine, waste oil, waste emulsified oil, basic sediment, mud or injurious substances produced or used in the drilling, development, producing, transportation, refining and processing of oil.

15. Development shall mean any work which actively looks toward bringing in production, such as erecting rigs, building tankage, drilling wells, etc.

. . .

19. Fresh Water shall mean surface and subsurface water in its natural state, useful for domestic livestock, irrigation, industrial, municipal and recreational purposes and which will support aquatic life.

. . .

35. Operator shall mean the person who is duly authorized and in charge of the development of a lease or the operation of a producing property.

. . .

37. *Owner shall mean the person or persons who have the right to drill into and to produce from any common source of supply, and to appropriate the production either for himself, or for himself and others.*

. . .

39. *Plug shall mean the closing off, in a manner prescribed by the Commission, of all oil, gas and water-bearing formations in any producing or non-producing well-bore before such well is abandoned.*

40. Pollution is the contamination of fresh water, either surface or sub-surface by salt water, mineral brines, waste oil, oil, gas and other deleterious substances produced from or obtained or used in connection with the drilling, development, producing, refining, transporting or processing of oil or gas within the State of Oklahoma.

. . .

44. Producer — See 'Operator' or 'Owner'." (emphasis added)

"3-400. ABANDONMENT AND PLUGGING OF WELLS."

"3-401. SCOPE.

(a) *The owner and operator of any oil, gas, disposal, injection or other service well, or any seismic, core or other exploratory hole, whether cased or uncased, shall be jointly and severally liable and responsible for the plugging thereof in accordance with these* rules.

(b) *Each well in which production casing has been run, but which has not been operated for six (6) months; and each well in which no production casing has been run, and for which drilling operations have ceased for thirty (30) consecutive days, shall be immediately plugged. Each well shall be immediately plugged before it is abandoned.*

(c) The Director of Conservation may, for good cause, grant reasonable extensions of time within which to plug a well.

3-402. NOTICE.

A separate 'Notification of Intention to Plug' for each well shall be filed, in duplicate, with the Conservation Division on Form 1001 at least five (5) days prior to the commencement of plugging operations. The Director of Conservation may waive or reduce the five day notice requirement whenever a qualified representative of the Conservation Division is available to supervise the plugging operation.

3-403. SUPERVISION AND WITNESSING.

Each plugging operation shall be conducted under the supervision of an authorized representative of the Conservation Division. The plugging operator shall notify the appropriate District Office of the Conservation Division of the exact time or times during which all plugging operations will take place within sufficient time to enable a representative of the Conservation Division to be present.

3-404. METHOD OF PLUGGING.

(a) The provisions and requirements of this rule shall govern the plugging of all wells drilled for oil or gas purposes, including oil and gas wells, dry holes, water, gas or other injection wells, salt water supply or disposal wells or other service wells. They shall likewise apply to the plugging of the lower formations in a well which is plugged back to a shallower formation.

(b) *The specific procedures and requirements of this rule are minimum requirements. Every well shall be plugged in such manner as will permanently prevent the migration of oil, gas, salt water or other fluids into or out of any productive formation by means of the well bore, and to protect all fresh water strata encountered in the well from contamination or escape*

of water therefrom. The methods and materials used shall conform to good and accepted practices and standards in the industry.

(c) The term 'mud' as used herein shall mean mud of not less than thirty-six (36) viscosity (A.P.I. Full Funnel Method) and a weight of not less than (9) pounds per gallon. Unless otherwise specified, the injection of cement into the well shall be by the tubing and pump method or the pump and plug method. 'Productive formation' shall mean any formation encountered in the well which is known to contain oil or gas, or which is permeably connected or otherwise in communication with a formation or formations known to contain oil or gas in the same general area. Multiple zones or lenses constituting a common source of supply of oil or gas shall be regarded as one productive formation.

(d) Before any casing is removed from a well, all salt water and oil in the well shall be removed or displaced and the well shall be filled with mud. As the casing is removed the well shall be kept filled with mud.

(e) Any uncased hole below the shoe of any casing to be left in the well shall be filled with cement to a depth of at least fifty (50) feet below the shoe of the casing, or the bottom of the hole, and the casing above the shoe shall be filled with cement to at least fifty (50) feet above the shoe of the casing. If the well is completed with a screen or liner and the screen or liner is not removed, the well bore shall be filled with cement from the base of the screen or liner to at least fifty (50) feet above the top of the screen or liner.

(f) *Each productive formation shall be sealed off from the well bore above and below such formation by filling the well bore with cement from a point fifty (50) feet below the base of the formation to a point fifty (50) feet above the base of the formation, and from a point fifty (50) feet below the top of the formation to a point fifty (50) feet above the top of the formation,* provided that, (1) if the productive formation is already sealed off from the well bore with adequate casing and casing is not to be removed from the well, these requirements shall not apply, and (2) if the only openings from the productive formation into the well bore are perforations in the casing and if the annulus between the casing and the outer walls of the well is filled with cement for a distance of fifty (50) feet below the base of the formation and a distance of fifty (50) feet above the top of the formation, then a bridge plug capped with ten (10) feet of cement set at the top of the producing formation is authorized. The placing of the cement on top of a bridge plug may be the bailor method.

(g) *All fresh water strata encountered in the well shall be sealed off and protected by adequate casing extending from a point at least fifty (50) feet below the base of the lowest fresh water strata to within three (3) feet of the top of the well bore and by completely filling the annular space behind such casing with cement.* If the surface or other casing in the well meets these requirements, a cement plug may be set at least fifty (50) feet below the shoe of the casing and extend at least fifty (50) feet above the shoe of the casing. If the casing and cement behind the casing does not meet the requirements of this subsection, the well bore shall be filled with cement from a point fifty (50) feet below the base of the lowest fresh water strata to a point fifty (50) feet above the shoe of the surface pipe. The top thirty (30) feet of the well bore below three (3) feet of the surface of the ground shall, in all events, be filled with cement.

(h) All intervals between cement plugs in the well bore shall be filled with mud.

(i) Any 'rat or mouse hole' used in the drilling of a well with rotary tools shall be filled with mud to a point eight (8) feet below the ground level and with cement from such point to a point three (3) feet below the ground level and filled in with earth above the top of the cement.

(j) The top of the plug of any plugged well shall show clearly, by permanent markings inscribed or embedded in the cement, the well number and date of plugging.

3-405. PLUGGING RECORD.

Within fifteen (15) days after a well has been plugged, the owner or operator shall file a Plugging Record, in duplicate, with the District Office on Form 1003. If there is not a complete and correct log on the well on file with the Commission, then the owner at the time of plugging shall furnish and file a complete and correct log thereof, or the best information available." (emphasis added)

The evidence showed the rules to have been satisfied in all particulars.

The undisputed facts show that the defendant was an owner and operator at all relevant times of oil and gas wells on the premises and that, under the Statutes of Oklahoma and the Rules of the Oklahoma Corporation Commission above quoted, it had the right and duty to plug the wells, known to have leaked oil and deleterious, polluting substances to the surface for many years, (testimony of Burke Healey) using the methods and manner which it did in order to seal off the productive formation so as to permanently prevent the migration of oil, gas, salt water or other fluids into or out of the productive

formation and to protect all fresh water strata from contamination and pollution. Plaintiff failed to introduce any evidence that the methods and manner of plugging by defendant were excessive or that methods and manner of plugging utilized by defendant were not necessary to avoid contamination of the surface and the fresh water strata or that defendant acted in bad faith.

2. The defendant Mobil Oil Corporation was an owner and operator of the wells on the lease at the end of the Nelson Geyer farmout, and *it had the duty, liability and responsibility to plug the wells.* The partial assignment to Nelson Geyer (Thermo-Dyne, Inc.) did not relieve it of this duty, liability and responsibility. *Loriaux* v. *Corporation Commission*, 514 P.2d 941 (Okla. 1973); *United States* v. *79.55 Acres of Land, etc. Rogers Co. Okl.*, 459 F.2d 185 (C.A. 10 1972).

3. The oil and gas lease provides that the defendant had the right at any time during or after the expiration of the lease to remove all of its property including the right to draw and remove all casing, and it did this in the process of plugging the wells and abandoning the lease.

4. Mobil Oil Company had a right to be on the premises and it was not a trespasser. It would be gross negligence for the defendant to leave an abandoned oil and gas well open and not properly plugged from the bottom to the surface. *Cleary Petroleum Inc.* v. *Copenhaver*, 476 P.2d 327 (Okla. 1970); *Magnolia Petroleum Co.* v. *Witcher*, 284 P. 297 (Okla. 1929).

5. Plaintiff failed to introduce any evidence to sustain the proposition that the defendant knowingly, willfully, or wrongfully interfered with the plaintiff's contractual relations with Nelson Geyer or Thermo-Dyne, Inc. Further, the acts of defendant were in response to a legal duty and responsibility by virtue of which the defendant could not have been guilty of wrongful interference. *Bailey* v. *Banister*, 200 F.2d 683 (C.A. 10 1952).

6. Mr. Gannon testified that on November 17, 1971, he called an employee of Mobil, a Mr. Bland who was employed as a senior landman, and asked that Mobil refrain from plugging. Gannon testified that Bland said he would stop the plugging.

The plaintiff's proof did not show Bland to have had authority in such matters and for this reason Gannon's testimony on this issue is without force or effect. *Atchison, Topeka and Santa Fe Railway Co.* v. *Bouziden*, 307 F.2d 230 (C.A. 10 1962).

Even assuming the accuracy of Gannon's uncorroborated testimony, it is fundamental that where one person has purported to act as agent for another, that fact of itself is not sufficient evidence upon which to submit the question of agency to the jury. *Horton* v. *Fielder*, 267 P. 847 (Okla. 1928). In the absence of corroborative evidence, the statements of the purported agent are not even admissible for purposes of establishing agency, and should be excluded from the consideration of the jury. *Horton* v. *Fielder, supra.* Further, a promise made without consideration is unenforceable, 15 O.S. (1971) §2, 106; *Powers Restaurants, Inc.* v. *Garrison*, 465 P.2d 761 (Okla. 1970). There is no evidence that Gannon, to any degree, relied upon Bland's alleged statement and, therefore, Bland's alleged promise was in no way enforceable, *Black Gold Petroleum Co.* v. *Hill*, 108 P.2d 784 (Okla. 1941). As a matter of law there was no consideration given for Bland's alleged promise and consequently there was no issue of fact to be submitted to the jury, 15 O.S. (1971) §2, 106.

7. As the lease was valid throughout the period in dispute and as the lease itself contained no express terms pertaining to plugging and abandoning, save that lessee had the right to remove its property and fixtures and remove casing during or after the expiration of the lease, the subsequent issue is whether Mobil breached any duty that could be implicitly imposed by the lease. This determination rests upon a consideration of the judicial and equitable doctrine of implied covenants, as it relates to the law of oil and gas leases.

8. The standard by which the oil and gas lessee's duty under implied covenants is measured is the conduct which would be followed by a reasonably prudent operator acting with regard to both his own interests and those of the lessor, *Sun Oil Company* v. *Frantz*, 291 F.2d 52 (C.A. 10 1961); MERRILL, COVENANTS IMPLIED IN OIL AND GAS LEASES §122 (2d ed. 1940). It also bears observing that it is a well settled rule of law in Oklahoma that oil and gas leases, as with other instruments, incorporate the law into the lease, *see Oklahoma Natural Gas Company* v. *Long*, 406 P.2d 499 (Okla. 1965). Since each case presents varied circumstances, many factors must be considered in applying the "prudent operator rule." One common factor, however, is that of the probability of profit to the lessee, *Whitaker* v. *Texaco, Inc.*, 283 F.2d 169 (C.A. 10 1960); *Chenoweth* v. *Pan American Petroleum Corporation*, 314 F.2d 63 (C.A. 10 1963); a factor not shown by the evidence herein.

9. In the case of *Amex Petroleum Corp.* v. *Corp. Comm'n.*, 47 OBAJ 1600 (decided July 13, 1976) the Corporation Commission ordered the lease owner and operator to plug the gas wells involved. The lease owner and operator appealed from the Order of the Commission, which Order was affirmed by the Supreme Court of Oklahoma in its Opinion cited above. The land owners leased their lands involved herein in 1937, after which numerous gas wells were drilled. By various assignments these wells were finally owned and operated by Amax Petroleum Corporation. In late 1957 or 1958 Amax decided to abandon the gas field, and there had been no operation of the wells since that time. In 1959 Amax assigned back to the land owners the oil and gas lease. In 1974 the Corporation Commission field inspector found some wells which had not been prop-

erly plugged since their abandonment in 1959, approximately 15 years earlier. The testimony shows that some of the wells in the field had been plugged and that others had been assigned back to the lessors. In this connection the Court found:

> "We hold that under the fact situation here that the assignment to the . . . [landowners] did not relieve the appellant [Amax] of its duty to plug the wells.
>
> Our conclusion is supported by our holding in a somewhat similar case, Loriaux v. Corporation Commission, Okl., 514 P.2d 941 (1973)."

The Court further said:

> "Thus, the person to plug the well is the lease operator . . . and the time to plug is when the well is abandoned and certainly not before. . . .
>
> . . .
>
> One final question is suggested by appellant and that involves an order after so much passage of time after abandonment. While this delay is unfortunate, no reason is presented to us as to why this would set aside the lease owner-operator's duties and obligations and we see none. The delay resulted in the failure to plug the wells which the Corporation Commission has held is the appellant's obligation."

10. Plaintiff contended that these wells had value as "prospect holes," for drilling to lower formations, and that such value was destroyed by plugging of the holes. Plaintiff's cited authority for such a proposition, *North Healdton Oil & Gas Co.* v. *Skelley*, 158 P. 1180 (Okla. 1918), does in no wise create such a cause of action. *North Healdton* antedated and thus did not contemplate the plugging rules of the Corporation Commission. Further, *North Healdton* pertains to the breach of drilling contracts for test holes and not lease provisions and the prudent operator rule.

11. Plaintiff's last contention was that Mobil carried out the plugging decision imprudently and maliciously, through placement of steel, chain, and other material into the hole in order to prevent re-entry. Neither the deposition testimony of Geyer nor plaintiff's expert showed the plugging to have been carried out in a fashion outside the range of methods which might properly be used depending on the conditions. Defendant's testimony, unrefuted, showed that the particular geological conditions warranted the use of a "tailpipe" in plugging and in order to prevent leakage. Further, the surface owner testified that the manner in which Mobil plugged the wells in question prevented the migration of oil, gas and other contaminating substances to the surface. Such plugging methods as were used were those necessary to bring about conservation of the surface and subsurface. As is indicated in *Sinclair Oil & Gas Company* v. *Bishop*, 441 P.2d 436 (Okla. 1968), the defendant-operator is entitled, in deciding the degree of plugging necessary, to rely on its own experts.

12. Having reviewed the evidence and the authorities, the Court concludes that, on several bases, the directed verdict should be in defendant's favor. Having carefully considered the evidence in a light most favorable to the plaintiff, *Miller* v. *Brazel*, 300 F.2d 283 (C.A. 10 1962) the Court determined that the evidence supported but one conclusion with which reasonable men could not disagree. Additionally, the particular issues in this case arise out of construction of a written instrument and thus do not present matters triable of right to a jury.

An appropriate Judgment will accordingly be entered herein.

Dated this 15th day of September, 1976.

s/ Luther Bohanon
UNITED STATES DISTRICT JUDGE

APPENDIX D

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